84-500 (1)

Office-Supreme Court, U.S.
FILED
SEP 28 1984
ALEXANDER L. STEVAS,
CLERK

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, STATE OF MISSISSIPPI, F. E. UITHOVEN, G. E. UITHOVEN, and CARRIE UITHOVEN

Petitioners

VERSUS

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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37 pp

QUESTIONS PRESENTED FOR REVIEW

Is it a legally insufficient defense within the meaning of Rule 12(f) of the Federal Rules of Civil Procedure to assert that the United States of America may not condemn property listed on the National Register of Historic Places under the provisions of the National Historic Preservation Act of 1966, 16 U.S.C. 461 et seq (hereinafter referred to as "NHPA") before it complies with NHPA and implementing procedures for compliance promulgated by the Advisory Council on Historic Preservation at 36 C.F.R. §800.1 et seq?

Congress explicitly required the Corps of Engineers to comply with NHPA "prior to the expenditure of any Federal funds on the undertaking." The District Court found as a fact that the Corps of Engineers had not complied with NHPA prior to its expenditure of federal funds to condemn the National Register site in question. Thus, the legal issue succinctly presented is whether it is legally sufficient for the Corps of Engineers to comply with NHPA after it has expended federal funds on the condemnation where Congress has explicitly required compliance before the expenditure of any federal funds.

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OPINIONS BELOW

The first opinion of the District Court is unreported. It is reproduced in the Appendix hereto. The first opinion of the Court of Appeals for the Fifth Circuit is reported at 639 F.2d 299. It is also reproduced in the Appendix hereto.

The second opinion of the District Court is reported at 567 F.Supp. 987 and is also reproduced in the Appendix hereto. The second opinion of the Court of Appeals is reported at 733 F.2d 377. It is also reproduced in the Appendix hereto.

GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED.

The second judgment of the Court of Appeals was entered on June 4, 1984. The time of entry was not recorded by the Court of Appeals. A petition for rehearing was timely filed but denied on July 2, 1984. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND REGULATIONS WHICH THE CASE INVOLVES

The Declaration of Taking Act (hereinafter referred to as "DOTA") provides in pertinent part:

> [T]he petitioner may file in the cause...a declaration of taking signed by the authority empowered by law to acquire the lands....Upon the filing of said declaration of taking and of deposit [of estimated just compensation]...title shall vest in the United States and said land shall be deemed to be condemned and taken for the use of the United States....(Emphasis Supplied) (40 U.S.C. §258(a))

NHPA provides in pertinent part:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal Department or independent agency having authority to license any undertaking shall prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take in account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Section 470i and 470t of this title, a reasonable opportunity to comment with regard to such undertaking. (Emphasis supplied) (16 U.S.C. §470(f))

This case also involves the regulations of the Advisory Council on Historic Preservation, 36 C.F.R. §801.1 et seq. These regulations are lengthy and pertinent provisions thereof are reproduced in the Appendix hereto.

STATEMENT OF THE CASE

This is an eminent domain action instituted by the United States of America pursuant to DOTA. The basis for jurisdiction in the Court of first instance was 28 U.S.C. §1258. The United States Army Corps of Engineers seeks to incorporate Petitioners' property into the "Barton Ferry Recreation Area" which is a peripheral scheme to enhance the Columbus Lock and Dam Segment of the Tennessee-Tombigbee Waterway Project for recreational facilities.

The property is the site of the old twin towns of Colbert and Barton, Mississippi. An antebellum home, named "Cedar Oaks," is located on the subject property. The property has been in the Uithoven family since 1913 and is part of the "Colbert-Barton Townsites"

which is a "historic site" individually listed on the National Register of Historic Places under the provisions of the NHPA, U.S.C. § 470(a).

Since 1913 the Uithoven family has been stewards of this land, retaining the historic site in a substantially undisturbed condition and nurturing a productive tree farm with the guidance and assistance of the Mississippi Forestry Commission.

The action was commenced on February 14, 1978 by complaint. On February 24, 1978, in response to a Government motion, the District Court entered a Judgment of Declaration of Taking vesting title in the property to the Government.

The Defendants, petitioners in this Court, timely filed their answer and asserted an affirmative defense to the condemnation, to-wit, that the property was listed on the National Register of Historic Places and that the Government was empowered by law to acquire said site onl_ after it had complied with NHPA and implementing procedures for compliance

promulgated by the Advisory Council on Historic Preservation.

The Government then filed a motion to strike this defense. After hearing the District Court granted the motion to strike.

Final judgment was entered and a notice of appeal was filed on August 25, 1980.

Following oral argument, a panel of United States Court of Appeals for the Fifth Circuit rendered an opinion on March 13, 1981, affirming the portion of the opinion and judgment of the Trial Court which struck non-compliance with NHPA as a defense to the condemnation itself. However, the panel vacated another portion of the judgment and remanded the cause for a determination of whether compliance has taken place, for purposes of deciding whether to withhold possession by the Government or to issue appropriate injunctive relief. 639 F.2d 299 (5th Cir.1981).

The landowners timely filed an Application for Writs of Certiorari. The United States responded to this Application by

asserting, inter alia, that said Application was premature for the reason that, since the Court of Appeals remanded the case for further proceedings, the case, at that time, was not ripe for review by the Court. The landowners first Application for Writs of Certiorari was denied.

On remand, the landowners filed their counter-claim setting forth claims that the Corps of Engineers had not complied with either NHPA or the related National Environmental Policy Act (hereinafter NEPA), 42 U.S.C. §4332 et seq. The Government moved to dismiss this counterclaim and, on August 26, 1983 the District Court denied the motion.

Thereafter, the Government filed a motion for summary judgment. This motion was opposed by extensive evidentiary materials including affidavits, depositions, and exhibits. The landowners strongly contended that compliance had never taken place. Nevertheless, the District Court, on June 30, 1983, granted the motion for summary judgment and dismissed the landowners' counterclaim. The principal focus

of the District Court's opinion was that, although the Government had not complied with NHPA before it condemned the National Register site in 1978, it had complied by the time the motion for summary judgment was submitted for adjudication in 1983. 567 F.Supp. 987 (N.D. Miss. 1983)

Final judgment was entered on June 30, 1983 and, on July 18, 1983, the landowners' filed their second notice of appeal.

Following oral argument a second panel of the United States Court of Appeals for the Fifth Circuit rendered its opinion on June 4, 1984. The Judgment of the District Court was affirmed. The principal focus of the second panel's decision was that one panel cannot disregard the precedent set by a prior panel even though it perceives error in the precedent. The Petitioners' application for rehearing was denied on July 22, 1984.

REASONS RELIED ON FOR THE GRANTING OF THE WRIT

The Court of Appeals Has Decided an Important Question of Federal Law, Which has Not Been, But Should Be, Settled by This Court

Petitioners contend that 16 U.S.C. §470f requires that the United States Government comply with the regulatory procedures established pursuant to that Section before it can lawfully condemn property under DOTA, 40 U.S.C. §258a.

U.S.C. §470f explicitly requires statutory compliance "prior to the approval of the expenditure of any Federal funds on the undertaking."

The procedures for compliance with Section 470f are established by regulations found at 36 C.F.R. §800.1, et seq. These regulations include "condemnation" as an "undertaking." An elaboration of the procedures is unnecessary for the resolution of this case.

All parties agree that the law is settled

that under DOTA, title automatically vests in the Government upon the filing of a declaration of taking and payment into the registry of court the estimated just compensation, subject, however, to the right of the condemnee to show that the Government lacks authority to condemn.

Petitioners contend that since DOTA requires expenditure of federal funds at the time of the filing the Declaration of Taking, the plain language of Section 470f dictates that the Government comply with Section 470f and regulations promulgated pursuant to it before filing the Declaration of Taking. Should the Government condemn without complying, the condemnee can assert the Government's noncompliance as a defense to the condemnation. The defense is in the nature of a plea in abatement, precluding condemnation until such time as the Government complies. See, e.g., United States v. 10.69 Acres of Land, 425 F.2d 317 (9th Cir. 1970) and Maiatico v. United States, 302 F.2d 880 (D.C. Cir. 1962).

The public importance of this case

novelty. The decision of the Court of Appeals herein is the first circuit court decision on this issue, and there have been only four district court decisions on the point, and these are in conflict. United States v. 4.18 Acres of Land, Civil No. 3-74-33 (D. Idaho February 20, 1975). (Reproduced in the Appendix); United States ex rel. TVA v. Three Tracts of Land, 415 F.Supp. 586 (E.D. Tenn. 1976); United States v. 45,149.48 Acres of Land, 455 F.Supp. 192 (E.D. N.C. 1978); and Paulina Lake History Cabin Owners Association v. U.S.D.A. Forest Service, 577 F.Supp. 1188 (D. Org. 1983). The subject matter involves the construction and reconciliation of NHPA and DOTA, federal statutes governing the broad powers of the Government to condemn private property and the expressed intent of Congress to further historic preservation. The public interest in the proper application of these laws is apparent. Petitioners submit that the

opinions of the Court of Appeals are both contrary to the plain meaning of NHPA and the clearly expressed will of Congress, but are likely to have an especially influential impact on the future development of the law and the practices of federal agencies.

Section 470F of NHPA explicitly requires compliance with the Act and implementing regulations "prior to the approval of the expenditure of any federal funds on the undertaking." (Emphasis Supplied) See Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982) at 859, N.3; Ely v. Velde, 497 F.2d 252 4th Cir. 1974); 36 C.F.R. §800.1 et seq (especially 800.4). The Government cannot obtain ownership of the land without first paying just compensation. The payment of just compensation is obviously an expenditure of Federal funds on the undertaking, rendering the Act and the regulations fully operable. Nevertheless, the Court of Appeals' decisions exempt from the requirements of NHPA the approval of the expenditure of federal funds for the

acquisition of title and effectively hold that DOTA impliedly amends NHPA. Based on its construction of the two (2) statutes, the Court of Appeals, in its first opinion, concluded (Appendix pp. 15-16):

> ...we conclude that only an express statement of Congress that NHPA noncompliance is a defense to a condemnation itself would be sufficient to achieve that result. While it may seem that the asserted defense would promote the purposes of the NHPA by creating a means of enforcement to give it "teeth" it is manifestly apparent that only Congress can make such a judgment.

We respectfully submit that this construction of the two (2) statutes departs form established principles of statutory construction.

In the first place, NHPA is explicit, clear and unambiguous. As such, it should be applied as written and not held to be impliedly amended by DOTA. Consumer Product Safety Commission v. GTE Sylvania, 100 S.Ct. 2051 (1980) at 2056; Andrus v. Sierra Club, 99 S.Ct. 2335 (1979); Statutory Construction §46.01 and §46.04; Caminetti v. United States, 37 S.Ct. 192 (1917); Swarts v. Steiger, 117 F.13 (8th Cir. 1902); Sturges v. Crownin-

Shield, 4 L.Ed. 529 (1817). We respectfully submit it is not within the province of the Court of Appeals to restrict the application of Congressional enactments unless exceptional circumstances are present. Mobil Alaska Pipeline Co., et al, v. United States, 436 U.S. 631, 643, 98 S.Ct. 2053, 56 L.Ed2d 591, 601 (1978); Commissioner of Internal Revenue v. Brown, 85 S.Ct. 1162 (1965) at 1166;

Secondly, we respectfully submit that it is erroneous to hold that NHPA and DOTA are in conflict and that DOTA impliedly amends NHPA to apply to the approval of any federal funds on the undertaking, other than for condemnation. It is a well established principle of statutory construction that amendments by implication, like repeals by implication, are not favored. See, for example, United States v. Welden, 84 S.Ct. 1082 (1964) at 1087, N. 12. The proper resolution of the issue presented in this action requires that DOTA and NHPA be read and considered together. It is an axiomatic

principle of statutory construction that, in the absence of exceptional factors, words will be given their ordinary meaning and where different statutes apply to a case, they will be read in such a way as to reconcile their application. Morton v. Mancari, 417 U.S. 535, 551, 94 S.Ct. 2474. Likewise, in Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) the Court made it clear at 1133 that NHPA should be "read into" the agency's authority. The Court reasoned that NHPA is a "mandatory" and "unequivocal command" to federal agencies (1137 at N.31) and that applicable federal statutes should be read in para materiae and reconciled, unless there is a clear conflict in statutory terms, so as to effectuate all statutory requirements. See also United States v. 10.69 Acres of Land, 425 F.2d 317 (9th Cir. 1970), and United States v. 18.2 Acres, 442 F.Supp. 800 (E.D. Cal. 1977) at 807.

Nevertheless, rather than reconciling the two statutes when, as in this case, the Government seeks to condemn property listed on

the National Register, the opinion of the Court of Appeals impliedly amends NHPA and rejects its clear statutory command that the Government must comply with the Act and implementing regulations "prior to the approval of the expenditure of any Federal funds on the undertaking." (Emphasis Supplied)

NHPA and DOTA may be easily reconciled by holding that until the Corps of Engineers properly complies with the statutory prerequisites established by Congress, the Government is not authorized to proceed with the condemnation of any historic site listed on the National Register of Historic Places. In the statutory terms of DOTA, the agency is not "empowered by law to acquire" unless and until it complies with procedural requirements mandated by Congress. Noncompliance should be a defense to the condemnation because of the well settled jurisprudential rule noted in the first decision of the Court of Appeals that a condemnee may challenge "the validity of the taking for departure from the statutory

limits." Indeed, the "lack of authority" defense to condemnation is purely jurisprudential and for that reason alone it is incongruous for the Court of Appeals to hold that if NHPA was to be considered a defense it would require an express statement by Congress.

Third, even if the two (2) statutes do conflict, and we respectfully submit that they do not, it is erroneous for the Court of Appeals to hold that DOTA impliedly amends NHPA. DOTA was enacted in 1931 and NHPA was enacted in 1966. It is a well established principle of statutory construction that in the event of a conflict in statutory terms, the latest declaration of Congress prevails. Sutherland, Statutory Construction, at §22.22, citing United States v. Yuginovich, 41 S.Ct. 551 (1921). Therefore, if there is to be any implied amendment of the two (2) statutes, NHPA should be held to impliedly amend DOTA.

Fourth, the Court of Appeals notes that "it may seem that the asserted defense would promote the purpose of the NHPA by creating a

means of enforcement to give it 'teeth.' " Nevertheless, the Court of Appeals declined to construe the statute in such a manner as to effectuate the Congressional purpose. In so doing, we most respectfully submit that the Court of Appeals did not follow the rule of statutory construction that it is the task of the courts to "interpret the words of those statutes in light of the purposes Congress sought to serve." Chapman v. Houston Welfare Rights Organization, 99 S.Ct. 1905 (1979) at 1911.

Fifth, the narrow interpretation of NHPA as is implicit in the decision of the Court of Appeals contravenes statutory construction principles mandated by NEPA. NEPA expresses a strong federal policy in favor of preserving the natural environment, including our "historic and cultural heritage." 42 U.S.C. §4331. To this end, Congress has directed that "to the fullest extent possible," all laws, regulations, and policies of the United States should be interpreted and administered

in accordance with the policies of NEPA.[1] 42 U.S.C. §4332(1); Ely v. Velde, 451 F.2d 1130

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1. Compare analogous NEPA cases holding that there must be procedural compliance at a time which will be meaningful in view of Congressional dictates that agencies fully disclose impacts and give full consideration to alternatives. See, for example, Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983); Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1108, 1128 (D.C. Cir. 1971); City of Boston v. Volpe, 464 F.2d 254, 257 (1st Cir. 1972); Environmental Defense Fund v. TVA, 468 F.2d 1164 (6th Cir. 1972); Scientists' Institute Commission, 481 F.2d 1079, 1093-1094 (D.C. Cir. 1973); Rhode Island Committee on Energy v. General Services Administration, 397 F.Supp. 41, 55-61, (D.R.I. 1975). Surely, compliance is not meaningful if it comes after the agency makes a decision as to the location of a project and the use of a particular piece of property and expends funds and resources in implementing that decision.

(4th Cir. 1971) at 1132, N. 4.

If the two statutes are read and considered together, the plain and precise language of Section 470f clearly requires that the agency seeking to condemn must first comply with Section 470f. This construction in no way departs from the authorities holding that the only defense to a DOTA condemnation is lack of authority to take and that district courts do not properly consider matters of propriety or expediency. The position of Petitioners would merely require that the condemning agency comply with NHPA and consider historic preservation factors before exercising its discretionary decision making authority to condemn National Register property and spending federal funds to implement its decision.

The wisdom of the Congressional NHPA mandate lies in the fact that it requires an agency to consider the effect of condemning National Register property before, not after, the taking. After the taking, the agency is "locked in" to the use of the particular land

and the consideration of alternative locations as a means of mitigating damage becomes truly a "pro forma ritual." The only way to achieve meaningful compliance to apply NHPA as written and require compliance before the agency selects a National Register site at which to locate a high-density public use project. Moreover, once property is in the hands of the Government, the alternative of preservation through private initiative is, for all practical purposes, dead. Indeed, the Congressional declaration of policy on NHPA clearly recognizes the importance of private preservation efforts and seeks to further encourage such efforts by the passage of the Act. 16 U.S.C. §470.

The wisdom of the congressional scheme is ignored, however, by the opinions of the Court of Appeals, and in its place is substituted the requirement that the Government comply only after condemnation. Petitioners respectfully submit that this ignores Congressional intent and substitutes the

judgment of the Court for that of Congress[2] on the procedures agencies must follow.[3]

Furthermore, the Court of Appeals' holding that the taking of title is "environmentally neutral" is explicitly contrary to the regulations of the Advisory Council on Historic Preservation. A condemnation is clearly included within the

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2. Nothing in the legislative history of NHPA indicates that congress meant for condemnation to be an exception to the requirements established by section 470f. See, 1966 United States Code Congressional and Administrative News, 3307, et seq. For a cogent analysis of the legislative history, see Watch v. Harris, 603 F.2d 310 (2nd Cir. 1979) wherein it was observed at 323 that NHPA's "legislative history reveals a determination to protect historic properties at every stage where the agency approves funding..."See also Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3rd Cir. 1983) at 279 & 280. Thus NHPA is clearly applicable at the stage where the agency decides whether or not to locate a development project on a National Register Site and approves the funding for the acquisition of the historic site.

3. The corollary of the rule that the judiciary should not supplant its judgment for that of Congress or the Executive Branch on the "wisdom" of condemnations is that the judiciary should not supplant its judgment for that of Congress on the question of the procedures agencies are to follow in carrying out their delegated responsibilities. As this Court held in Berman v. Parker, 348 U.S. 26 (1954) at 33, the power of eminent domain is merely a means to the end and the means by which it will be attained is for the Congress to determine.

regulations' meaning of an "undertaking." 36 C.F.R. §800.2; 36 C.F.R. §800.3. The Advisory Council's long-standing interpretation of the term "effect" is further explained in J.M. Fowler, "Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law," 12 Wake Forest L.Rev. 31 (1976).

In the opinion of the Court of Appeals, NHPA noncompliance would have no effect on the agency decision to condemn the property. In so holding, the Court of Appeals has effectively shielded agency decisions to condemn National Register Property from judicial reveiw. We respectfully submit that the Court of Appeals' implicit finding that agency decisions to condemn National Register properties are unreviewable contravenes well established principles of administrative law. See Abbott Laboratories v. Gardner, 87 S.Ct. 1507 (1967) at 1511; Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co., 415 F.2d 403 (5th Cir. 1969) at 413, N. 20.

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In Citizens to Preserve Overton Park v. Volpe, 91 S.Ct. 814 (1971), this Court held that the Administrative procedures Act, 5 U.S.C. §701, makes agency decisions reviewable except where there is a statutory prohibition of review or where the "agency action is committed to agency discretion by law." In the instant case, there is no "clear and convincing" evidence that agency decisions to condemn National Register Property are to be unreviewable. There is no statutory prohibition of review. And it is well settled that agency decisions to condemn are not committed to the unbridled discretion of the agency because it is well settled that judicial review may be had of the issue of whether the limits of authority were exceeded. This is precisely what we seek in this case. We do not seek to have the Court review the necessity, propriety, expediency or policy of the Government's decision to condemn this land. Such matters may well be committed to the discretion of the agency. But, we do seek to have the Court review the agency's

compliance with the procedural law. All Governmental decisions must be made in accordance with the procedural requirements established by Congress and decisions to condemn National Register property should be no different.

The Court of Appeals has Decided a Federal Question in a Manner which Is In Conflict With a State Court of Last Resort

The Court of Appeals decision is in conflict with the decision of the Florida Supreme Court in Seadade Industries, Inc. v. Florida Power & Light Co., 275 So.2d 209 (1971) which decided the broader question of whether the failure to comply with environmental procedural requirements is a defense to a condemnation. See also Givson v. Ruckelshaus, 3 ERC 1028 (E.D. Tex. 1971) and Nichols, Eminent Domain, (Vol. 7 § 14.04).

CONCLUSION

The decision of the Court of Appeals in this case is the first circuit court of appeals decision on this important issue of law and public policy. The district court

decisions are divided. The Court of Appeals' decision conflicts with a decision of the Florida Supreme Court. Two very important statutes are involved, and the decision of the Court of Appeals, if left standing, will govern the practices of federal agencies with regard to the condemnation of National Register properties.

Despite its precedental importance, the opinion of the Court of Appeals conflicts with the plain terms of 16 U.S.C. §470(F) and its implementing regulations, is contrary to the expressed Congressional policies of NHPA and departs from accepted principles of statutory construction.

The statutory construction adopted by the Court of Appeals ignores the clear letter of an Act of Congress and substitutes the judgment of the Court for that of Congress on the procedures agencies must follow. As the holdings now stand, a Governmental agency may expend substantial federal funds and condemn a National Register site even though the District Court has found as a fact that there

has been no compliance "prior to the approval of the expenditure of any federal funds on the undertaking." Such a judicial construction, we respectfully submit, is not in accordance with the clear letter of an Act of Congress.

We therefore respectfully conclude that this Petition for Writ of Certiorari should be granted.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I do hereby certify that three (3) copies of the above and foregoing have been mailed, postage prepaid, United States Mail, addressed to counsel of record at his post office address, Mr. Jacques Gelin, Attorney, Appellate Section, Land and Natural Resources Division, United States Department of Justice, Washington, D.C., 20530, and that three (3) copies have been mailed, postage prepaid, United States Mail, to the Solicitor General, Department of Justice, Washington, D.C., 20530, this 27th day of September, 1984.

J. ARTHUR SMITH, III